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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

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7 ARNOLD ANDERSON,

8 Plaintiff,

9 v.

10 C. PASTUNA, *et al.*,

11 Defendants.

Case No. 2:17-cv-00808-APG-GWF

ORDER

Application to Proceed *in Forma Pauperis*
(ECF No. 1) and Screening of Complaint
(ECF No. 1-1)

12 This matter comes before the Court on Plaintiff's Application to Proceed *in Forma*
13 *Pauperis* (ECF No. 1), filed on March 17, 2017.

14 **BACKGROUND**

15 Plaintiff alleges that four police officers violated his Fourth, Fifth, Sixth, Twelfth, and
16 Fourteenth Amendment rights through illegal seizure and unlawful arrest. He alleges that the
17 officers falsified documents, conducted an illegal identification line up, and violated his due
18 process and equal protection rights. He further alleges that he was arrested without a warrant
19 and was falsely prosecuted by Defendant Palal, a district attorney.

20 **DISCUSSION**

21 **I. Application to Proceed *In Forma Pauperis***

22 Plaintiff filed this instant action and attached a financial affidavit to his application and
23 complaint as required by 28 U.S.C. § 1915(a). Reviewing Plaintiff's financial affidavit pursuant
24 to 28 U.S.C. § 1915, the Court finds that Plaintiff is unable to pre-pay the full filing fee. As a
25 result, Plaintiff's request to proceed *in forma pauperis* in federal court is granted.

26 **II. Screening the Complaint**

27 Federal courts must conduct a preliminary screening in any case in which a prisoner
28 seeks redress from a governmental entity or officer or employee of a governmental entity. *See*

1 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss
2 any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or
3 seek monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. §
4 1915A(b)(1),(2).

5 In addition to the screening requirements under § 1915A, pursuant to the PLRA, a federal
6 court must dismiss a prisoner's claims, "if the allegation of poverty is untrue," or if the action "is
7 frivolous or malicious," "fails to state a claim on which relief may be granted," or "seeks
8 monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2).
9 Dismissal of a complaint for failure to state a claim upon which relief may be granted is provided
10 for in Federal Rule of Civil Procedure 12(b)(6), and the Court applies the same standard under
11 Section 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint.

12 Review under Fed. R. Civ. P. 12(b)(6) is essentially a ruling on a question of law. *See*
13 *Chappel v. Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for
14 failure to state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in
15 support of the claim that would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756,
16 759 (9th Cir. 1999). In making this determination, the Court takes as true all allegations of
17 material fact stated in the complaint, and the Court construes them in the light most favorable to
18 the plaintiff. *See Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Allegations in a
19 *pro se* complaint are held to less stringent standards than formal pleadings drafted by lawyers.
20 *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (*per*
21 *curiam*). While the standard under Rule 12(b)(6) does not require detailed factual allegations, a
22 plaintiff must provide more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*,
23 127 S.Ct. 1955, 1964-1965 (2007). A formulaic recitation of the elements of a cause of action is
24 insufficient. *Id.*, *See Papasan v. Allain*, 478 U.S. 265, 286 (1986).

25 All or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if the
26 prisoner's claims lack an arguable basis either in law or in fact. This includes claims based on
27 legal conclusions that are untenable (*e.g.* claims against defendants who are immune from suit or
28 claims of infringement of a legal interest which clearly does not exist), as well as claims based

1 on fanciful factual allegations (*e.g.* fantastic or delusional scenarios). *See Neitzke v. Williams*,
2 490 U.S. 319, 327-28 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

3 **III. Instant Complaint**

4 Plaintiff's complaint seeks relief for what appears to be alleged violations of his Fourth,
5 Fifth, Sixth, Twelfth, and Fourteenth Amendment rights. Plaintiff seeks compensatory damages
6 and damages for pain and suffering. He alleges that four police officers in their individual and
7 official capacities lied and falsified documents to unlawfully arrest him for what appears to be
8 charges of murder and/or battery with a weapon. He alleges that another suspect pled guilty to
9 this charge. Plaintiff further alleges that Defendant Palal unlawfully prosecuted him.

10 **1. Prosecutorial Immunity**

11 State prosecutors are entitled to absolute prosecutorial immunity for acts taken in their
12 official capacity. *See Van de Kamp v. Goldstein*, 555 U.S. 335, 342-43 (2009); *Kalina v.*
13 *Fletcher*, 522 U.S. 118, 123-25 (1997). "[T]he functional nature of the activities being
14 performed, not the status of the person performing them, is the key to whether absolute immunity
15 attaches." *Stapley v. Pestalozzi*, 733 F.3d 804, 810 (9th Cir. 2013). As such, prosecutorial
16 immunity does not extend to those actions of a prosecutor which are "administrative" or
17 "investigative" in nature. *See Van de Kamp*, 555 U.S. at 342-43 (explaining that prosecutorial
18 immunity does not apply, for example, when prosecutor gives advice to police during a criminal
19 investigation, makes statements to the press, or acts as a complaining witness in support of a
20 warrant application).

21 A prosecutor is entitled to absolute immunity from a civil rights action for damages when
22 he or she performs a function that is "intimately associated with the judicial phase of the criminal
23 process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); *Genzler v. Longanbach*, 410 F.3d 630,
24 636 (9th Cir.) (prosecutor protected by absolute immunity from liability for damages under
25 federal civil rights law when performing traditional functions of an advocate) (quoting *Kalina v.*
26 *Fletcher*, 522 U.S. 118, 131 (1997)), cert. denied, 546 U.S. 1031-32 (2005). A prosecutor is
27 entitled to absolute immunity for his or her acts in evaluating evidence assembled by
28 investigators or police and appropriate preparation for its presentation before a grand jury after a

1 decision to seek an indictment has been made. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273
2 (1993). A prosecutor, however, is not entitled to absolute immunity for the fabrication of
3 evidence to establish probable cause and to obtain an indictment. *Id.* at 275.

4 Plaintiff brings suit against District Attorney Binu Palal based on allegations that he
5 unlawfully prosecuted Plaintiff by filing charges against him. Plaintiff's allegations against
6 Defendant Palal relate to functions intimately associated with the judicial phase of the criminal
7 process. Therefore, Plaintiff's claim against District Attorney Binu Palal must be dismissed on
8 the grounds of prosecutorial immunity and the Court will recommend as such.

9 **2. Unlawful Arrest**

10 Plaintiff alleges that on September 5, 2016, four police officers acted together to falsify
11 information in order to have him arrested and charged with battery with a weapon for shooting
12 an individual named Norman Moody. He further states that on September 22, 2016, the case was
13 dismissed. *Plaintiff's Complaint* (ECF No. 1-1), 4, 6. He alleges that his Fourth, Fifth, Sixth,
14 Twelfth, and Fourteenth Amendment rights were violated based on his illegal arrest.

15 A claim for unlawful arrest is cognizable under § 1983 as a violation of the Fourth
16 Amendment. *Dubner v. City and County of San Francisco*, 266 F.3d 959, 964 (9th Cir.2001).
17 To proceed on that basis, the plaintiff must demonstrate that there was no probable cause or other
18 justification to arrest him. *Id.* Probable cause exists when the "facts and circumstances within
19 the officer's knowledge . . . are sufficient to warrant a prudent person, or one of reasonable
20 caution, in believing, in the circumstances shown, that the suspect has committed, is committing,
21 or is about to commit an offense." *Michigan v. DeFillippo*, 443 U.S. 31, 37.

22 The plaintiff bears the burden of proving the absence of probable cause. *Perez-Morciglio*
23 *v. Las Vegas Metro. Police Dep't*, 820 F. Supp. 2d 1111, 1121 (D. Nev. 2011) (citing *Beck v.*
24 *City of Upland*, 527 F.3d 853, 864 (9th Cir.2008)). The plaintiff can make a prima facie case
25 simply by showing that the arrest was conducted without a valid warrant. *Dubner*, 266 F.3d at
26 965. If the arrest was warrantless, the burden then shifts to the defendant to provide some
27 evidence that the arresting officers had probable cause for a warrantless arrest. *Id.* The plaintiff
28 still bears the ultimate burden of proof, but the burden of production falls on the defendant. *Id.*

1 Plaintiff alleges that the officers lied, falsified documents, and conducted an illegal
2 identification line up. He further alleges that he was arrested without a warrant. Therefore,
3 accepting Plaintiff's allegations as true, he has stated a claim for violation of his Fourth
4 Amendment rights based on a warrantless arrest issued without probable cause.

5 **3. Municipal Employee Liability Under § 1983 – *Monell* Claim**

6 To succeed on a *Monell* official-capacity action against a municipality's employee (e.g., a
7 police officer), a plaintiff must demonstrate that a policy or custom of an entity contributed to the
8 violation of federal law. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). In order for a plaintiff
9 to establish personal liability in a 1983 action, it is enough to show that the municipal employee,
10 acting under color of state law, caused the constitutional violation. *Id.*; see, e.g., *Monroe v.*
11 *Pape*, 365 U.S. 167 (1961). Here, Plaintiff alleges that he is suing the four police officer
12 Defendants in their individual and official capacities. Plaintiff, however, has not demonstrated
13 that any constitutional violations occurred as a result of an official policy of custom. *Monell v.*
14 *Dept. of Soc. Serv. Of City of N.Y.*, 436 U.S. 658, 690 (1978). Therefore, the Court will dismiss
15 the § 1983 claim against Defendants Pastuna, Auschwitz, Bryant, and Valenzuela, in their
16 official capacity, without prejudice. The Court will allow Plaintiff leave to amend his complaint
17 to states sufficient facts to state a claim, if he is able to do so.

18 If Plaintiff elects to proceed to amend his claim for violation of his Fourth Amendment
19 rights based on a warrantless arrest issued without probable cause against Defendants Pastuna,
20 Auschwitz, Bryant, and Valenzuela in their official capacity by filing an amended complaint, he
21 is informed that the Court cannot refer to a prior pleading in order to make his amended complaint
22 complete. Local Rule 15–1 requires that an amended complaint be complete in itself without
23 reference to any prior pleading. This is because, as a general rule, an amended complaint
24 supersedes the original complaint. See *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.1967). Once
25 Plaintiff files an amended complaint, the original pleading no longer serves any function in the
26 case. Therefore, in an amended complaint, as in an original complaint, each claim and the
27 involvement of each defendant must be sufficiently alleged. Accordingly,

1 **IT IS THEREFORE ORDERED** that Plaintiff's Application to Proceed *in Forma*
2 *Pauperis* is **granted**. Plaintiff shall not be required to pay an initial partial filing fee. However,
3 even if this action is dismissed, the full filing fee must still be paid pursuant to 28 U.S.C.
4 § 1915(b)(2).

5 **IT IS FURTHER ORDERED** that the movant herein is permitted to maintain this action
6 to conclusion without the necessity of prepayment of any additional fees or costs or the giving of
7 security therefor. This Order granting *forma pauperis* status shall not extend to the issuance of
8 subpoenas at government expense.

9 **IT IS FURTHER ORDERED** that, pursuant to 28 U.S.C. § 1915(b)(2), the Nevada
10 Department of Corrections shall pay to the Clerk of the United States District Court, District of
11 Nevada, 20% of the preceding month's deposits to Plaintiff's account (inmate #1202768), in the
12 months that the account exceeds \$10.00, until the full \$350.00 filing fee has been paid for this
13 action. The Clerk of the Court shall send a copy of this Order to the Finance Division of the
14 Clerk's Office. The Clerk shall also send a copy of this Order to the attention of the Chief of
15 Inmate Services for the Nevada Department of Corrections, P.O. Box 7011, Carson City, NV
16 89702.

17 **IT IS FURTHER ORDERED** that Plaintiff's claim against Defendants Pastuna,
18 Auschwitz, Bryant, and Valenzuela, in their official capacity, is dismissed without prejudice with
19 leave to amend. Plaintiff shall have until **July 23, 2018** to file an amended complaint which
20 corrects the noted deficiencies.

21 **IT IS FURTHER ORDERED** that Plaintiff's claim for violation of his Fourth
22 Amendment rights based on a warrantless arrest issued without probable cause as to Defendants
23 Pastuna, Auschwitz, Bryant, and Valenzuela, in their individual capacity, may proceed.

24 **IT IS FURTHER ORDERED** that the Clerk of Court shall file the Complaint (#1-1).

25 **IT IS FURTHER ORDERED** that the Clerk of the Court shall issue summons to
26 Defendants C. Pastuna, J. Auschwitz, K. Bryant, and G. Valenzuela named in the complaint and
27 deliver the summons to the U.S. Marshal for service. The Clerk of the Court shall send the required
28 USM-285 forms to Plaintiff. Plaintiff shall have twenty (20) days to furnish the required USM-

1 285 forms to the U.S. Marshal at 333 Las Vegas Blvd. South, Suite 2058, Las Vegas, Nevada
2 89101. After Plaintiff receives copies of the completed USM-285 forms from the U.S. Marshal,
3 he has twenty (20) days to file a notice with the court identifying if Defendants were served. If
4 Plaintiff wishes to have the U.S. Marshal attempt service again on any unserved defendants, then
5 a motion must be filed with the court identifying the unserved defendant, specifying a more
6 detailed name and address and indicating whether some other manner of service should be used.
7 Pursuant to Rule 4(m) of the Federal Rules of Civil Procedure, service must be accomplished
8 within ninety (90) days from the date that the complaint was filed.

9 **IT IS FURTHER ORDERED** that henceforth, Plaintiff shall serve upon Defendants, or
10 their attorney if they have retained one, a copy of every pleading, motion, or other document
11 submitted for consideration by the court. Plaintiff shall include with the original paper submitted
12 for filing a certificate stating the date that a true and correct copy of the document was mailed to
13 Defendants or their counsel. The Court may disregard any paper received by a district judge,
14 magistrate judge, or the Clerk which fails to include a certificate of service.

15 **RECOMMENDATION**

16 **IT IS HEREBY RECOMMENDED** that Plaintiff's claims against Defendant District
17 Attorney Binu Palal be dismissed with prejudice due to Plaintiff's failure to state a claim for
18 which relief can be granted. As a state prosecutor, Mr. Palal is entitled to absolute prosecutorial
19 immunity for acts taken in his official capacity and any claims against him cannot proceed.

20 **NOTICE**

21 Under Local Rule IB 3-2, any objection to this Finding and Recommendation must be in
22 writing and filed with the Clerk of the Court within fourteen (14) days. Appeals may be
23 waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S.
24 140, 142 (1985). Failure to file objections within the specified time or failure to properly address
25 and brief the objectionable issues waives the right to appeal the District Court's order and/or

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1 appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157
2 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

3 Dated this 22nd day of June, 2018.

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6 GEORGE FOLEY, JR.
7 UNITED STATES MAGISTRATE JUDGE
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